Supreme Court, U.S.
FILED
MAY 17 1994
OFFICE OF THE CLERK

No. 93-1631

In The

Supreme Court of the United States

October Term, 1993

LLOYD BENTSEN, SECRETARY OF THE TREASURY, ET AL.,

Petitioners,

v.

ADOLPH COORS COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Tenth Circuit erred in affirming the district court's holding that the government failed to prove that factually accurate statements of alcohol content on malt beverage labels [such as "3.2% alc/vol"] would lead to strength wars among brewers, and that the government's statutory prohibition of such statements therefore imposed a restraint on commercial speech in violation of the First Amendment.

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Respondent Adolph Coors Company ("Coors") respectfully requests this Court to deny the petition for writ of *certiorari*.

STATEMENT OF THE CASE

In 1935, long before commercial speech was recognized as protected under the First Amendment, Congress enacted the Federal Alcohol Administration Act, 27 U.S.C. § 201 *et seq.* ("FAAA"). Thereunder, statements of

alcohol content such as "3.2% alc/vol" are prohibited on malt beverage labels unless required by state law. 27 U.S.C. § 205(e)(2). Four decades later, commercial speech was afforded First Amendment protection by this Court for the first time. ***Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,*** 425 U.S. 748, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976). Coors initiated this action in 1987 challenging the labeling restriction as an illegal restraint on commercial speech in violation of the First Amendment.[1]

The district court initially found that the labeling prohibition violated the First Amendment. Govt. Pet. App. D. On the first appeal, ***Adolph Coors Company v. Brady,*** 944 F.2d 1543 (10th Cir. 1991) (***"Coors I"***), the Tenth Circuit held that the first and second tests of ***Central Hudson Gas and Electric Corporation v. Public Service Commission of New York,*** 447 U.S. 557, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980), namely, "protected speech" and "substantial governmental interest," were satisfied. The case was remanded, however, for trial with respect to the third and fourth ***Central Hudson*** tests, namely, whether the labeling prohibition "directly advanced" the government's asserted interest in preventing strength wars and, if so, whether it was not more extensive than necessary, ***i.e.,*** a "reasonable fit."

On remand, the district court again found that the labeling prohibition violated the First Amendment. Govt. Pet. App. C. In the government's second appeal, the

[1] Coors had initially also challenged advertising prohibitions set forth in 27 U.S.C. § 205(f)(2). That claim, however, was subsequently dropped at trial and is not an issue in this case.

Tenth Circuit affirmed the district court's determination that the labeling prohibition did not "directly advance" the asserted governmental interest of preventing strength wars, and that the prohibition therefore infringed the First Amendment. ***Adolph Coors Company v. Bentsen,*** 2 F.3d 355 (10th Cir. 1993) (***"Coors II"***). The Tenth Circuit then found it unnecessary to address the district court's additional determination that the labeling prohibition was more extensive than necessary, ***i.e.,*** not a reasonable fit. ***Id.*** at 359, n. 6.

The Tenth Circuit's decision is extremely narrow and limited. It declared unconstitutional only that very specific part of 27 U.S.C. § 205(e)(2) which prohibits alcohol content disclosure on malt beverage labels. This means, in essence, that the brewer is allowed to include a factually accurate statement such as "3.2% alc/vol" on the label without violating federal law. The decision allows consumers to receive truthful alcohol content information on malt beverage labels to make informed consumer choices and does nothing else.

SUMMARY OF ARGUMENT

The government has failed to satisfy any of the ***certiorari*** criteria appearing in Supreme Court Rule 10.1.

The Tenth Circuit's decision does not conflict with any decision of this Court. It has been settled since at least 1980 that commercial speech cases are subject to the four-part analysis set forth in ***Central Hudson, supra***. The only dispute in this case involves the third test, ***i.e.,*** whether the government's labeling prohibition "directly

advances" its asserted interest in preventing strength wars among brewers. Coors presented overwhelming evidence that there have been no strength wars in the wine and distilled liquor industries in the United States, or in the beer industries in other countries such as Canada and the European Community, where alcohol content labeling is required. Further, there is no incentive for brewers to engage in strength wars because mainstream consumers do not like or buy high alcohol content products because they are harsh tasting and are loaded with calories. Based on this evidence, the Tenth Circuit's determination – that the government failed to prove that its labeling prohibition "directly advanced" its goal – is both proper and not contrary to any decision of this Court.

The government's argument that it need only prove that Congress "reasonably believed" at the time of enactment that its prohibition would directly advance its asserted goal was properly rejected by the Tenth Circuit. The government's proposed rational basis test in a First Amendment context is contrary to a host of commercial speech decisions from this Court, including ***Edenfield v. Fane***, 507 U.S. ___, 113 S. Ct. 1792, 123 L.Ed.2d 543 (1993).

This is not a case involving a novel, important question of federal law which should be decided by this Court. First, the law is already settled. The Tenth Circuit's decision does not fill a gap in the law or extend any legal concepts. Rather, it represents application of the settled ***Central Hudson*** four-part test to a particular factual situation. Second, the issues involved are not substantial. The underlying issue – whether a beer label can contain "3.2% alc/vol" – is a relatively minor one. Finally, the constitutionality of state statutes is not at issue in this case. The

Tenth Circuit's decision does not allow a brewer to violate any state law. State regulation of alcohol raises Twenty-first Amendment issues which are not present in this case.

The government's petition for writ of ***certiorari*** should be denied.

ARGUMENT

A. The Tenth Circuit Has Not Decided A Federal Question In A Way That Conflicts With Applicable Decisions Of This Court.

The Tenth Circuit's decision is consistent with, not contrary to, all commercial speech decisions of this Court, and therefore ***certiorari*** is not warranted under Supreme Court Rule 10.1(c).[2]

1. All Commercial Speech Decisions Of This Court Use The Four-Part Commercial Speech Analysis Which Was Applied By The Tenth Circuit.

Since at least 1980, when this Court decided ***Central Hudson, supra***, the law has been clear that commercial

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[2] Supreme Court Rule 10.1 sets forth the reasons that will be considered in support of granting a petition for writ of ***certiorari***. The government's petition rests upon only two of the enumerated reasons: (1) the Tenth Circuit's decision conflicts with applicable decisions of this Court; and (2) the Tenth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. ***See*** Supreme Court Rule 10.1(c). The government does not seek ***certiorari*** under Rule 10.1(a) or (b).

speech cases are subject to a four-part analysis.[3] The ***Central Hudson*** four-part test has been applied in every one of this Court's commercial speech cases for the last decade.[4] The government does not contend in its petition that this four-part test should be changed. Thus the commercial speech test used by the Tenth Circuit is not in conflict with any decision of this Court, and ***certiorari*** is not warranted under Supreme Court Rule 10.1(c).

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[3] Therein this Court stated:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, supra, 447 U.S. at 566.

[4] ***See Edenfield v. Fane,*** 507 U.S. ___, 113 S. Ct. 1792, 123 L.Ed.2d 543 (1993); ***United States v. Edge Broadcasting Company,*** 509 U.S. ___, 113 S. Ct. 2696, 125 L.Ed.2d 345 (1993); ***City of Cincinnati v. Discovery Network, Inc.,*** 507 U.S. ___, 113 S. Ct. 1505, 123 L.Ed.2d 99 (1993); ***Board of Trustees of the State University of New York v. Fox,*** 492 U.S. 469, 475, 109 S. Ct. 3028, 106 L.Ed.2d 388, 400 (1989); ***Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico,*** 478 U.S. 328, 106 S. Ct. 2968, 92 L.Ed.2d 266 (1986).

2. The Tenth Circuit's Application Of The Four-Part Test To The Facts Of This Case Does Not Conflict With Any Decision Of This Court.

The Tenth Circuit's application of the four-part ***Central Hudson*** test to the particular facts of this case does not conflict with any decision of this Court.

a) The First And Second Parts Of The Four-Part Test Are Not At Issue.

Below, the parties did not dispute the first and second ***Central Hudson*** factors, namely, that factually accurate alcohol content labeling is protected by the First Amendment, and that the government's asserted interest in preventing strength wars among brewers is substantial. ***See Coors II, supra,*** 2 F.3d at 357, n. 3.

b) The Government Did Not Prove That Its Labeling Prohibition "Directly Advances" Its Asserted Interest In Preventing Strength Wars.

The *only* issue in this case involves the third part of the ***Central Hudson*** test, namely, whether the government's labeling prohibition "directly advances" its asserted interest of preventing strength wars among brewers. The district court and the Tenth Circuit found that the government failed to prove this connection.

The government's evidence on this issue was weak. First, the government presented some legislative history

from the 1935 time period which it interpreted as evidence that Congress "reasonably believed" that the labeling prohibition would prohibit strength wars. Second, the government presented some evidence that, in the extremely small (3%) malt *liquor* market segment of the malt beverage industry, some manufacturers have attempted to market their products using value laden semantics such as "strong" or "high test."

By stark contrast, Coors presented overwhelming evidence that alcohol content labeling does not lead to strength wars among brewers. First, Coors showed that no strength wars have developed in the wine and distilled spirits industries in the United States where alcohol content (*e.g.* "80 proof") has appeared on labels for decades.

Second, Coors presented extensive proof that no strength wars have developed among brewers in various states such as Minnesota, and in numerous countries including Canada and the European Community, where alcohol content appears on malt beverage labels.

Third, Coors demonstrated that mainstream consumers do not like or want stronger beer products and thus there is no incentive for brewers to engage in strength wars. Alcohol strength is not a selling point in at least 97% of the consumer market. Mainstream consumers are much more interested in a refreshing taste and fewer calories than they are with high alcohol levels. Most beer products contain 3-5% alcohol, with very few products reaching above 7% alcohol. This is because even a minor increase in alcohol strength above 3-5% makes the taste progressively harsher, to the point of being

"nasty" when the alcohol content approaches the malt *liquor* levels of 7%. Further, more alcohol means more calories. There is a pronounced market shift to no-alcohol, low-alcohol and "light" beers rather than stronger products. Since there is no market demand for high alcohol products, there is no incentive for brewers to engage in "strength wars."

Fourth, Coors showed that it is common knowledge that malt *liquors* have higher alcohol content than regular beer. However, consumers have largely avoided that market segment, which has remained flat at less than 3% of overall sales for many years.

The district court and Tenth Circuit concluded that the government failed to prove that its labeling prohibition directly advanced its asserted interest in preventing strength wars among brewers. This conclusion is evidentiary in nature and clearly not in conflict with any decision of this Court. Therefore certiorari is not warranted under Supreme Court Rule 10.1(c).

c) The Tenth Circuit Did Not Apply The "Wrong Standard" Under The Third Part Of The *Central Hudson* Test.

In its petition, the government argues that the Tenth Circuit applied the "wrong standard" in connection with the "directly advances" test when it applied ***Edenfield, supra,*** rather than a "reasonably believed" test which the government had proposed. ***See*** Govt. Pet. at 18-20. The government's proposed "reasonably believed" test is contrary to all of this Court's commercial speech cases.

The government argued to the Tenth Circuit that it should only be required to show that Congress "reasonably believed," when it enacted the labeling restriction at issue here, that the labeling prohibition would directly advance its asserted goal of preventing strength wars. The Tenth Circuit rejected this argument as contrary to this Court's decision in ***Edenfield, supra,*** which requires the government to prove that its prohibition in fact directly advances its asserted interest.[5]

The Tenth Circuit's rejection of the government's proposed "reasonably believed" standard under the third test of ***Central Hudson*** was correct and entirely consistent with every commercial speech case decided by this Court.

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[5] The Tenth Circuit stated:

> Since the Government filed its appellate brief, however, the Supreme Court has decided ***Edenfield v. Fane,*** ___ U.S. ___, 113 S. Ct. 1792, 123 L.Ed.2d 543 (1993), in which it articulates a standard that is consistent with our pronouncements ***Coors I*** and much stricter than the "reasonably believed" standard the Government would have us adopt. In ***Edenfield***, the Court stated that, under this third prong of the ***Central Hudson*** test, courts must determine "whether the challenged regulation advances [the government's] interests in a direct and material way." ***Id.***, at ___, 113 S. Ct. at 1798. It went on to say that the party restricting commercial speech carries the burden of justifying the restriction and that "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." ***Id.***, at ___, 113 S. Ct. at 1800.

See Coors II, supra, 2 F.3d at 357.

The government has not presented the Tenth Circuit or this Court with a single case which suggests that the government can infringe First Amendment rights simply because it "believes" that what it is doing "directly advances" its goal, irrespective of whether the reality matches the belief. This Court has never so held.

This Court has already clearly resolved the issue that the government's prohibition must directly advance its asserted goal. In ***Central Hudson, supra,*** this Court held that the "restriction must directly advance the state interest involved," and not that the government need only believe that the restriction directly advances the asserted interest. ***Central Hudson, supra,*** 447 U.S. at 564, 65 L.Ed.2d at 350. There must be an "immediate connection" between the prohibition and the government's asserted end. ***Id.***, 447 U.S. at 569, 65 L.Ed.2d at 353. If the means-end connection is "tenuous" or "highly speculative," the regulation cannot survive constitutional scrutiny. ***Id.*** Indeed, hopefully the government always believes that its actions advance its goals. However, the case law demonstrates that governmental beliefs can be wrong, and when they are they must give way to the First Amendment, irrespective of good intentions or beliefs.[6]

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[6] ***See Lindmark Associates, Inc. v. Willingboro,*** 431 U.S. 85, 97 S. Ct. 1614, 52 L.Ed.2d 155 (1977) (ban on the use of "for sale" signs in front of houses does not directly advance township's goal of integrated housing); ***Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,*** 425 U.S. 748, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976) (advertising ban does not directly advance professional standards); ***Bates v. State Bar of Arizona,*** 433 U.S. 350, 97 S. Ct. 2691, 53 L.Ed.2d 810 (1977) (ban on advertising does not directly advance goal of protecting the quality of a lawyer's work).

In some cases, such as ***Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico,*** 478 U.S. 328, 106 S. Ct. 2968, 92 L.Ed.2d 266 (1986), for example, the connection between the government's goal and its method of directly advancing that goal is obvious and immediate, and the government's proof is easy. In that case, this Court found, without much discussion, that the government's goal (reducing gambling by its residents) was directly advanced by its action (a ban on gambling advertisements). The connection between advertising and consumer demand for the advertised product was found almost as a matter of common sense. However, there is no suggestion in ***Posadas*** that the government's belief was incorrect or inconsistent with fact, that the government's belief would reign supreme if it were incorrect or inconsistent with fact, or that the parties even disputed the issue.

In other cases, the connection between the government's goal and its method of directly advancing that goal is not so obvious, and the government's proof is more difficult. For example, in ***Edenfield, supra,*** which was relied on by the Tenth Circuit, this Court struck down a state's restriction on client solicitations by CPA's as violative of the First Amendment right to exercise commercial speech. Therein, it was not so obvious that the government's goal (protecting consumers from fraud or overreaching by CPAs) was directly advanced by its action (prohibiting CPAs from soliciting clients). This Court unequivocally required the government to prove that the goal was indeed directly advanced by the prohibition. "[S]peculation or conjecture" by the government was not enough. ***Edenfield, supra,*** 123 L.Ed.2d at 555.

Rather, the government was required to "demonstrate [*i.e.,* prove] that the harms it recites are real and that its restriction will *in fact* alleviate them to a material degree." ***Id.*** (emphasis added). This Court then noted that the evidentiary record in that case did "not disclose any anecdotal *evidence* . . . that validates the [government's] suppositions [*i.e.,* "beliefs"]." ***Id.*** (emphasis added).

This Court's string of commercial speech cases from ***Central Hudson*** forward to ***Edenfield*** makes clear that the commercial speech test is a real life inquiry, not merely one of congressional "belief." ***See, e.g., United States v. Edge Broadcasting Company,*** 509 U.S. ___, 113 S. Ct. 2696, 125 L.Ed.2d 345 (1993); ***City of Cincinnati v. Discovery Network, Inc.,*** 507 U.S. ___, 113 S. Ct. 1505, 123 L.Ed.2d 99 (1993); ***Board of Trustees of the State University of New York v. Fox,*** 492 U.S. 469, 475, 109 S. Ct. 3028, 106 L.Ed.2d 388, 400 (1989).

In fact, this Court has expressly rejected a "rational basis" test in connection with the fourth ***Central Hudson*** test. In ***Board of Trustees of the State University of New York v. Fox,*** 492 U.S. 469, 109 S. Ct. 3028, 106 L.Ed.2d 388 (1989), this Court, in addressing the fourth ***Central Hudson*** factor, held that the government need not prove that its restriction is absolutely the least severe that will achieve the desired end, but need only be a reasonable fit. ***Id.,*** 492 U.S. at 480, 106 L.Ed.2d at 404. In so stating, this Court made clear the government must prove considerably more than a rational basis for the fit between the prohibition and the goal:

> We reject the contention that the test we have described is overly permissive. It is far different, of course, from the "rational basis"

> test used for the Fourteenth Amendment equal protection analysis.

Id. This rejection of a rational basis test in connection with the *Central Hudson* test was recently reiterated by this Court in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. ___, 113 S. Ct. 1505, 123 L.Ed.2d 99 (1993) as follows:

> To repeat, see n 12, supra, while we have rejected the "least-restrictive-means" test for judging restrictions on commercial speech, so too have we rejected mere rational basis review.

Id., 123 L.Ed.2d at 108, n. 13.

Contrary to the government's assertion, the Tenth Circuit's decision is entirely consistent with this Court's recent decision in *Edge Broadcasting*, which involved an entirely different issue. In that case, the plaintiff argued that the government's restriction "as applied" specifically to the plaintiff did not directly advance the asserted governmental interest. This Court held that in applying the third part of the *Central Hudson* analysis, the inquiry was not to be limited to a single entity, but, rather, was to be considered in its general application. It then looked to the actual evidence, and not the congressional "belief," to resolve this issue. In the case at bar, the Tenth Circuit applied the third part of the *Central Hudson* analysis to brewers in general, and not just to Coors or any one entity, concluding that the government's labeling prohibition did not directly advance its asserted interest of preventing strength wars among brewers. Thus the Tenth Circuit's decision is wholly consistent with *Edge Broadcasting*.

The government's other arguments are equally unavailing.[7]

The Tenth Circuit correctly rejected the government's invitation to limit its "directly advance" inquiry solely to what Congress may have "reasonably believed," irrespective of whether the belief matched the reality. It properly considered the record evidence on this issue in addition to the legislative history. Its decision is entirely consistent with all of this Court's commercial speech cases, and therefore *certiorari* is not warranted under Supreme Court Rule 10.1(c).

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[7] The government's argument that the Tenth Circuit "failed to consider the matrix of state laws" is without merit. Govt. Pet. at 16. First, the government never even made this argument to the district court or the Tenth Circuit. Second, the existence or nonexistence of [unidentified] state laws has no relevance to whether the federal government's prohibition directly advances its asserted goal.

The government's argument that the Tenth Circuit "ignored" a congressional intent under the FAAA to respect the state's rights under the Twenty-first Amendment is inapposite. Govt. Pet. at 15. Again, the government never made this argument to the district court or the Tenth Circuit. Also, the Twenty-first Amendment, which gives states broad power to regulate alcohol, has no relevance to whether the government's prohibition directly advances its asserted goal.

Finally, the fact that the labeling prohibition has been on the books since 1935 is of no consequence. It was not even subject to challenge until 1976 when commercial speech was first afforded First Amendment protection by this Court.

B. The Tenth Circuit Has Not Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Decided By This Court.

1. The Law Is Not Unsettled.

The Tenth Circuit has not decided an important question of federal law which has not been, but should be, decided by this Court, and therefore ***certiorari*** is not warranted under Supreme Court Rule 10.1(c). As discussed above, the four-part analysis to be applied in commercial speech cases has been firmly settled since at least 1980 and unquestionably remains viable today. The federal judiciary needs no Supreme Court guidance on this well settled test. That the "directly advances" test requires more than a "reasonable belief" by Congress is a founding axiom in this Court's last decade of commercial speech cases and is conclusively resolved by ***Edenfield, supra***.

2. An Important Question Of Federal Law Is Not Involved.

The Tenth Circuit's decision is extremely narrow and does not present an important question of federal law which should be decided by this Court. The decision invalidates the government's prohibition of truthful alcohol content, such as "3.2% alc/vol," on beer labels. It does nothing more. All federal *advertising* statutes and regulations remain in full force and effect. For example, brewers still cannot use value laden semantics, such as "strong" or "high test," anywhere, including labels and advertising. Also, all state laws remain in full force and effect.

3. The Constitutionality Of State Statutes Is Not At Issue In This Case.

The government argues that the Tenth Circuit's decision casts serious doubt on the constitutionality of various state laws relating to alcohol content labeling. ***See*** Govt. Pet. at 22-27. This argument is without merit for two reasons.

First, the constitutionality of any particular state law or regulation is not at issue in this case. The issues joined in the pleadings, and considered by the district court and Tenth Circuit, involve only the constitutionality of a federal statute – 27 U.S.C. § 205(e)(2) – and its implementing regulation. Neither Coors nor any other brewer is authorized, by the Tenth Circuit's decision, to violate any state law.

Second, state regulation of alcohol raises Twenty-first Amendment issues which are not present in this case. States have extremely broad powers under the Twenty-first Amendment to regulate alcohol, whereas the federal government does not. In any case involving state alcohol regulation, the tension between the state's Twenty-first Amendment right to regulate alcohol and the speaker's First Amendment right of commercial speech would need to be resolved. On at least three occasions, this Court, in examining the interface of these two amendments, has given extreme deference to the states' Twenty-first Amendment rights even where the state action infringes upon the First Amendment. ***See City of Newport v. Iacobucci,*** 479 U.S. 92, 107 S. Ct. 383, 93 L.Ed.2d 334 (1986) (per curiam); ***New York State Liquor Authority v. Bellanca,*** 452 U.S. 714, 101 S. Ct. 2599, 69 L.Ed.2d 357 (1981) (per curiam); ***California v. LaRue,*** 409 U.S. 109, 93

S. Ct. 390, 34 L.Ed.2d 342 (1972). The interplay of the First and Twenty-first Amendments was not an issue in the case at bar.

Also, even under a strict ***Central Hudson*** analysis of a state law, the state may assert an interest other than prevention of strength wars in support of its regulation. As is evident, a state's ban on alcohol content labeling presents a different case than the one at bar.

CONCLUSION

This case does not meet any of the ***certiorari*** criteria set forth in Supreme Court Rule 10.1. The Tenth Circuit's decision represents application of well settled commercial speech principles to a particular factual situation, in a manner entirely consistent with every decision of this Court. Review of this particular case by the Supreme Court would not materially advance commercial speech law. There are no compelling legal or factual issues. The Tenth Circuit's decision does not fill a gap in the law or extend existing law. Further, this Court has already entertained three commercial speech cases in 1993, namely ***Edenfield***, ***Edge Broadcasting***, and ***Discovery Network***. The petition should be denied.

Respectfully submitted,

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